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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

D2

[redacted]

Date: FEB 0 7 2012 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelly
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner described itself as a provider of wholesaler and distributor of wireless accessories. In order to continue to employ the beneficiary in what it designates as an accountant position, the petitioner seeks to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on April 9, 2009, finding that the petitioner (1) failed to submit the required "American Competitiveness and Workforce Improvement Act" (ACWIA) fee (and it did not establish that it is exempt from the fee); and (2) failed to submit a Labor Condition Application certified by the Department of Labor that is valid for the dates of intended employment (12/10/2009 to 12/09/2011).

A review of the record, however, demonstrates a more critical issue pertaining to the petitioner's eligibility to extend its employment of the beneficiary in H-1B status. Specifically, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). In this matter, the petition that the petitioner sought to extend (SRC 06 056 50336) expired on December 10, 2008. The instant petition was filed on January 5, 2009, twenty-seven days after the expiration of the original petition.[1]

As opposed to a discretionary extension of stay application, there is no discretion to grant a late-filed petition extension. In this matter, the director did not raise this issue in the denial, and thus it appears that the director erroneously exercised favorable discretion to the petitioner under the provisions of 8 C.F.R. § 214.1(c)(4)(i). The director's error is harmless, however, because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility, and the omission of this non-discretionary ground for denial did not result in the improper granting of a benefit in this matter, i.e., the error did not change the outcome of this case. *See Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004); *Black's Law Dictionary* 563 (7th Ed., West 1999) (defining the term "*harmless error*" and stating that it is not grounds for reversal).

As noted above, the petition must be denied as it was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). This non-discretionary basis for denial renders the remaining issues in this proceeding moot. For this reason, the appeal must be dismissed and the petition denied.

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[1] The AAO acknowledges that the Form I-129 petition was previously submitted to USCIS; however, it was properly rejected because the petitioner failed to submit all of the initial required evidence with the petition. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. All required petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. *See* 8 C.F.R. § 103.2(b)(1). Rejected petitions will not retain a filing date. *See* 8 C.F.R. § 103.2(a)(7)(i).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.